Supreme Court, U. S.
FILED
SEP 2 1975
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-68

GARY-HOBART WATER CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD
AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

BRIEF IN OPPOSITION OF UNITED STEELWORKERS OF AMERICA, AFL-CIO

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United Steelworkers of America, AFL-CIO (hereinafter "USWA"), a Respondent herein,[1] files this brief in opposition to the petition for writ of certiorari. As we show herein, this case presents no issue warranting this Court's attention.

COUNTER-STATEMENT OF THE CASE

The resolution of this case turned entirely upon the construction of a provision in the collective bargaining agreement between Petitioner and Respondent USWA. Petitioner's clerical employees engaged in a "sympathy" strike in support of the lawful strike being conducted by Petitioner's

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[1] The Petition incorrectly labels USWA an "intervenor." While USWA intervened as a party in the court below, its status in *this* Court is that of a Respondent.

production employees. Ordinarily, a sympathy striker enjoys a "protected" status under the NLRA, and cannot be disciplined for his participation. *Labor Board* v. *Rockaway News,* 345 U.S. 71, 80 (1953); *NLRB* v. *Southern Greyhound Lines, Inc.,* 426 F.2d 1299, 1301 (5th Cir. 1970). However, the right to engage in sympathy strikes may be waived in a collective bargaining agreement, and an "employee's breach of such an agreement may be grounds for his discharge without violating §7 of the Act," *Rockaway News, supra,* 345 U.S. at 80. The controlling question in this case, therefore, was whether the "no-strike" clause in the collective bargaining agreement forbade sympathy strikes, and thus had the effect of waiving the employees' statutory right to engage in such strikes.

A majority of the Board, and all three judges on the court below, construed the no-strike clause as forbidding only strikes over matters arbitrable under the collective bargaining agreement. As the sympathy strike in the instant case did not involve an issue which the clerical employees were entitled to arbitrate, the Board majority and the court below concluded that the strike was not contractually prohibited. It followed that the strikers were engaged in protected activities under the NLRA and thus that Petitioner's disciplinary actions, visited in reprisal for their striking, were in violation of the NLRA.

ARGUMENT

We believe that the Board majority and the court below were eminently correct in their construction of the collective bargaining agreement. The more important point at this stage, however, is that the decision below—which does no more than interpret particular language in a particular collective bargaining agreement—can have no precedential importance, and thus does not warrant review by this Court irrespective of one's views as to the correctness of that interpretation.

Petitioner treats the question "whether the no-strike commitment extends beyond arbitrable matters" (Petition, p. 8) as if it were a question of law, to which there must be one correct answer for all collective bargaining agreements. But in myriad collective bargaining agreements parties have fashioned a variety of no-strike clauses whose meaning and scope vary with the parties' particular needs and relative bargaining powers. It would hardly be surprising, therefore, that in a series of cases involving a number of collective bargaining agreements some no-strike clauses would be construed as blanketly prohibiting all strikes while others would be construed (as here) as prohibiting strikes only over arbitrable matters. There is not one "no-strike commitment" in American industry, but thousands, and their contents vary enormously.

Petitioner's failure to recognize that different agreements may have different meanings leads it into the error of asserting that the decision below conflicts with *Rockaway News, supra.* In *Rockaway News,* to be sure, this Court found a sympathy strike to violate a "no strike" clause; but the clause in *Rockaway* had both different language and a different negotiating history than that in the instant case.[2]

For like reasons, Petitioner's assertion that there is a "conflict among the circuits as to whether the no-strike commitment extends beyond arbitrable matters" (Petition, page 8) would be fallacious, even if the cited cases had construed the particular contracts before them as having differing meanings. But a close examination of the cases cited by Petitioner

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[2] The contract in *Rockaway News,* unlike that in the instant case, did not link the prohibition against strikes to the scope of matters subject to the grievance procedure. Additionally, in *Rockaway News* there was evidence that the union had sought in negotiations a clause which would *permit* sympathy strikes, but had settled without obtaining it, 345 U.S. at 79-80, a scenario quite different from that in the instant case (A 7).

reveals that they do not even involve differing constructions of collective bargaining agreements. Indeed, in the majority of the cited cases the courts refrained from expressing any view as to whether the strike was in breach of the agreement.[3]

This does not mean that the cited cases are not in conflict with each other: they are, but over an issue which is not presented in the instant case. In *Boys Market* v. *Retail Clerks Union*, 398 U.S. 235 (1970), this Court held that the federal courts have jurisdiction under Section 301 of the LMRA to enjoin strikes in breach of collective bargaining agreements *if such strikes are over matters which the parties have agreed to arbitrate*. That decision has led to a conflict among the courts of appeals as to whether a *Boys Market* injunction may issue where the *cause of the strike* is not arbitrable, but the *validity of the strike itself* is arbitrable. The conflict is not over the meaning of particular collective bargaining agreements, but over the extent of federal court jurisdiction under Section 301 to enjoin strikes in light of the Norris-LaGuardia Act. The instant case, which

[3] Of the five cases cited at pp. 8-9 of the Petition, the courts in the first three expressed no view as to whether the strike was in breach of the agreement. The only case cited by Petitioner which arose in the same legal context as the instant case—an NLRB proceeding to determine whether sympathy strikers were "protected" or in breach of a no-strike clause—is *Montana-Dakota Utilities Co.* v. *NLRB*, 455 F.2d 1088 (8th Cir. 1972). The court there construed the contract to allow the employer to discipline (but not discharge) employees who engaged in a sympathy strike. The court reached that result in light of evidence showing that in negotiations the union has sought a clause providing *"It shall not be a violation of this agreement, and* it shall not be cause for discharge *or discipline* if any employee or employees refuse to go through any authorized picket line of any Union;" that the employer has refused to agree to this clause; and that the union had ultimately acquiesced in a clause which omitted the italicized words. 455 F.2d at 1090. The negotiating history in the instant case has precisely the opposite import (A 7).

involves neither Section 301 nor a quest for an injunction, thus does not present the question over which the courts of appeals have divided.

In sum, this case involves nothing more than the interpretation of a particular collective bargaining agreement; its resolution, while undoubtedly important to the parties herein, can have no precedential importance in the development of the law; and accordingly, there is no occasion for this Court to grant review.

CONCLUSION

For the reasons set forth hereinabove, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 29, 1975

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